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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re  
MARK E. MOON,  
Debtor.

Case No. 20-30711  
Chapter 11  
Adv No. 20-03117

E. MARK MOON *et al.*,  
Plaintiffs,  
vs.  
MILESTONE FINANCIAL, LLC *et al.*,  
Defendants.

**REPLY IN SUPPORT OF  
SUPPLEMENTAL BRIEF OF  
MILESTONE FINANCIAL, LLC ON  
MOTION AND COUNTER-MOTION FOR  
AWARD OF ATTORNEYS' FEES ON  
APPEAL**

Date: May 25, 2024  
Time: 10:00 a.m.

The Hon. Dennis Montali

1 **I. THE MOON'S HAVE REQUESTED THAT THE COURT OF APPEAL RULE ON THE**  
2 **ATTORNEYS' FEE ISSUE**

3 “[T]he general rule is that the award of attorney's fees on appeal should be fixed in the first  
4 instance by the district court.” *Sokol v. Bernstein*, 812 F.2d 559, 561 (9th Cir. 1987) (*quoting*  
5 *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970). In accordance with this rule, this Court, in  
6 deferring any ruling on the BAP Fee motion, ruled that it would adjudicate the fees for all appeals  
7 after conclusion of the Ninth Circuit Appeal. Order at p.5, Ex. 4. (“[i]f this court’s decision, and  
8 the BAP’s affirmance are both affirmed, this court can then resolve all of the unresolved attorney’s  
9 fees remaining on either side for all appeals”).

10 In the Moon’s supplemental brief, they do not address the Ninth Circuit appeal attorneys’  
11 fees in any manner. Subsequently, and without alerting the Court of their intent to do so, the  
12 Moons filed an application with the Ninth Circuit asking it to award fees solely as to the Ninth  
13 Circuit Appeal. A copy of this Motion is attached as Exhibit 1 to this brief. Milestone has filed an  
14 opposition requesting that the Court of Appeals transfer that request to this Court on a multitude of  
15 grounds, including that Milestone has sought fees in this Court, the Court is already reviewing the  
16 fee issue and it creates a risk of inconsistent rulings, and that the Moons have shown no basis to  
17 upset the general rule of first presenting fees to the trial Court. A copy of this opposition brief is  
18 attached as Exhibit 2.

19 Milestone simply raises this issue to alert the Court. Milestone knows of no authority that  
20 provides that the filing of a fee application with the appellate court stays this Court’s ability to  
21 award fees. As such, Milestone requests the Court proceed with ruling as to the fee determination  
22 as to all appeals, as previously indicated, without further delay. Milestone can then alert the Court  
23 of Appeals of the decision.

24 **II. THERE IS NO PREVAILING PARTY DUE TO BOTH PARTIES LOSING THEIR**  
25 **RESPECTIVE APPEALS**

26 In their supplemental brief, the Moons argue that they are the prevailing party as, after all  
27 appeals are done, they received a substantial victory in the reduction of interest. They in fact take  
28 an entirely different position than they did in the BAP fee motion, and now request all fees and

1 costs for both appeals.

2       This analysis not supported by Ninth Circuit authority. In determining whether a party is  
3 entitled to fees, “the party prevailing on the contract shall be the party who recovered a greater  
4 relief in the action on the contract. The court may also determine that there is no party prevailing  
5 on the contract for purposes of this section.” Cal. Civ. Code § 1717(b). Here, the Moons only  
6 argument is that they are the prevailing party as they prevailed below and the ruling was affirmed.  
7 Supplemental Brief pp.3-4. No authority supports that position when there are two appeals and  
8 the results were that both parties succeeded in defeating the other party’s appeal.

9       This issue was considered in the matter of *Corder v. Gates*. There, plaintiff, who had won  
10 at the district court level, had the amount of the award significantly reduced on appeal by the  
11 defendant. *Corder v. Gates*, 104 F.3d 247, 248 (9th Cir. 1996). Upon a motion for fees for the  
12 appeal, the plaintiff argued that, since they still won an award, they were the prevailing party on  
13 appeal. *Id.* at 249. The Ninth Circuit rejected this argument as “[t]he net result of the various  
14 appeals was a reduced award for plaintiffs. Accordingly, plaintiffs were not the prevailing parties  
15 on appeal.” *Id.* at 250.

16       The *Corder* case has been cited by the California Court of Appeal for the proposition that  
17 “the reversal of the attorney fee award and remand to the trial court for further proceedings means  
18 that on that issue of the appeal respondent was not the prevailing party.” *Harman v. City & Cnty.*  
19 *of San Francisco*, 158 Cal. App. 4th 407, 425 (2007) (citing *Corder*). The California Court of  
20 Appeal thus found that “[t]he appeal, like the underlying action, was one in which limited success  
21 was realized. Thus, the failure of the trial court to make any effort to apportion the award of  
22 attorney fees on appeal to account for time spent on the unrelated and unsuccessful attorney fees  
23 claim in the prior appeal was error.” *Id.*

24       While no California Court of Appeal case considers this exact issue, as set forth in  
25 Milestone’s supplemental brief, the case of *In re Haythorne* is persuasive. “Damon and  
26 Haythorne were equally successful in defending against one another's cross-appeals; therefore,  
27 neither can reasonably be declared the ‘prevailing party’ over the other.” *In re Haythorne*, 2019  
28 WL 6520050, at \*2 (C.D. Cal. Sept. 11, 2019). As set forth in the supplemental brief, this is in

1 accord with California law regarding the prevailing parties as to competition cross-complaints, and  
2 logically similar scenarios.

3 *Mustachio v. Great W. Bank*, the case cited by the Moons for the proposition that 1717  
4 allows them to prevail despite losing on their appeal, does not support their argument. First, as  
5 noted by the Moons, in that case the appeal occurred during the case, not at the end of the case like  
6 in this action. *Mustachio v. Great W. Bank*, 48 Cal. App. 4th 1145, 1149 (1996). But more  
7 importantly, the *fee award was reduced by the court due to the mixed decision on appeal*. The  
8 *Mustachio* court found no error in the trial court doing so. *Id.* at 1151. Like *Mustachio*, Milestone  
9 only asks this Court to reduce the fee award as Milestone won half the appeal. Milestone is not  
10 asking for more than an offset or reduction. Accordingly, this Court should follow *Mustachio* and  
11 deny fees to both parties.

12 The other cases cited by the Moons are irrelevant. *Frog Creek* involved fees after a  
13 petition to compel arbitration. *Frog Creek Partners, LLC v. Vance Brown, Inc.*, 206 Cal. App. 4th  
14 515, 546 (2012). *Disputesuite.com* arises out of a successful motion to dismiss for improper  
15 forum, where the litigation was ongoing elsewhere. *DisputeSuite.com, LLC v. Scoreinc.com*, 2  
16 Cal. 5th 968, 977 (2017). Neither matter involves an appeal, and thus they have little persuasive  
17 value compared to the cases cited by Milestone which deal with the exact issue before the Court.

18 Finally, the Moons argue the cross-appeal was for significantly less money and should be  
19 disregarded. As set forth in Milestone's opposition to the Fee Motion, the amounts at stake were  
20 similar. \$290,443.78 in pre-maturity interest on Milestone's appeal and \$178,223.85 as to Moon's  
21 cross-appeal. (Opposition to Renew Fee Motion p.5). The Moons agree with this calculation (and  
22 then some) in their supplemental brief, but argue the Court should have cut off post-maturity  
23 interest as of the date of the judgment. (Moon Supplemental Brief, p.5). This argument bears no  
24 weight, as the judgment simply declared the rights of the parties as to interest. It did not create a  
25 judgment for damages in favor of the Moons.

### 26 **III. CORRECTION TO FEE REQUEST**

27 In its supplemental brief, Milestone provided two numbers for its fees to the Ninth Circuit.  
28 First, it stated it had incurred \$45,091.00 in total fees litigating both Ninth Circuit Appeals.

1 Second, it stated that it had incurred \$29,239.13 in fees on the cross-appeal where it prevailed.

2       Upon review, this second number of \$29,239.13 was incorrect and due to an error in how  
3 Milestone's counsel had prepared the fee spreadsheet. This is the number Milestone spent on its  
4 appeal, where the Moons prevailed. The correct number for the cross-appeal is \$15,926.88. A  
5 corrected spreadsheet is attached as Exhibit 3 to this reply. Milestone apologizes for the error.

6                                   **IV. CONCLUSION**

7       For the reasons set forth above, the Court should conclude there was no prevailing party  
8 and deny fees and costs to both parties.

9  
10 DATED: May 17, 2024

PRACTUS, LLP

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13 By:           /s/ Bernard J. Kornberg            
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